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HASNOR AFIFAH MOHD NOOR & ANOR v. XFYRE (M) SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
ELAINE YAP CHIN GAIK JC
[ORIGINATING SUMMONS NO: BA-24NCC-15-02-2023]
20 NOVEMBER 2024

B

Abstract – *(i) As a registered business has no separate legal personality apart from its owner or partners (defined in Registration of Business Act 1956 as business associates), it does not cease to exist when the business registration expires. The registered business associates do not need leave of court to enforce a business contract in their own name, in the same way that the counterparty to such a business contract may also freely sue them; (ii) A bankrupt has no capacity to affirm an affidavit on behalf of the company. His averments pertaining to the company is inadmissible and cannot be relied upon; (iii) There is no basis for a party to apply to stay proceedings or to seek any interim relief under s. 11 of the Arbitration Act 2005 if it has submitted to the jurisdiction of the court for the determination of the matters in question in an originating summons; and (iv) An application for security for costs ought to be dismissed if the costs are proved to be recoverable from the parties involved, that there is no evidence produced to demonstrate that the parties are impecunious or otherwise unable to pay costs or that there is an attempt to evade costs.*

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CONTRACT: *Termination – Sale and purchase agreement – Failure to deliver goods – Whether owner or partner of registered business may sue to enforce contract properly made in relation to business, and do so in individual name without leave of court, after business registration expired – Whether s. 8(1) of Registration of Business Act 1956 deprive sole proprietor of company locus standi – Whether action filed within six year limitation period under s. 6(1)(a) of Limitation Act 1953 – Whether deponent of affidavit adjudicated a bankrupt and has no capacity to affirm affidavit on behalf of company – Companies Act 2016, s. 198(1)*

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ARBITRATION: *Proceedings – Stay – Stay pending referral of dispute to arbitration – Whether there were steps taken in court proceedings – Attending and participating in case managements and hearings – Whether tantamount to unequivocal submission to jurisdiction and intention to proceed in court – Whether agreement to arbitrate waived – Arbitration Act 2005, s. 11*

H

CIVIL PROCEDURE: *Security for costs – Application for – Whether there was delay in filing application – Whether costs recoverable from foreign party – Whether there was attempt to evade costs – Whether there was well founded case on evidence adduced – Whether application ought to be dismissed*

I

Simfoni Humaira Resources (as buyer) and the first defendant (as seller) entered into a sales and purchase agreement ('SPA') of disposable nitrile gloves. The total contract value was RM7,164,000. A deposit of RM1,194,000 ('deposit') was paid to the account of Messrs Fahmi Zafri Ashraf & Co ('FZA & Co') as the seller's solicitors. FZA & Co, Simfoni Humaira Resources and the first defendant then entered into a stakeholders' agreement under which FZA & Co undertook to hold the deposit as a neutral stakeholder. The monies were deposited into the client account of the firm. Issues arose with the delivery of the goods purchased under the SPA. Based on a series of email exchanges in March/April 2021 between the first defendant, the first plaintiff and the second plaintiff, the plaintiffs claimed that the SPA was mutually terminated. In the originating summons, the plaintiffs sought a declaration that the SPA had been mutually terminated after the first defendant failed to deliver the goods purchased and consequently, the sum of RM1,194,000 held under a stakeholders' agreement should be refunded. More than a year after the initiation of the suit, the first defendant filed encl. 56 for various reliefs: (i) the plaintiffs to furnish security for costs in the sum of RM150,000 each to the first defendant's solicitors as stakeholders (under s. 11(1)(e) of the Arbitration Act 2005 and O. 23 of the Rules of Court 2012; (ii) plaintiffs be compelled to commence arbitration proceeding within six months from an order (to stay proceedings under s. 10 of the Arbitration Act 2005), and failing that, or if the proceedings result in the first defendant's favour, costs here and in the arbitration be assessed and recovered from the security for costs; and (iii) the sum of RM1,194,000 held by FZA & Co be at *status quo* pursuant to s. 11(1)(a) of the Arbitration Act 2005. The first defendant raised various preliminary objections in support of encl. 56 which were (i) based on s. 8 of the Registration of Business Act 1956 ('RBA'), the first plaintiff had no *locus standi* to enforce a contract under an invalid business registration without leave of court; (ii) the second plaintiff did not exist when the matters in dispute transpired; (iii) the content of the plaintiffs' affidavits was hearsay and inadmissible and/or scandalous and constituted contempt in the face of the court by reference to various factual assertions; and (iv) the action was time-barred.

Held (dismissing encl. 56):

(1) Section 8(1) of the RBA deals with the right of a person who is or claims to be the owner or partner of a business, to enforce its contracts, if the particulars of such person are not registered under the RBA or if the business itself is not registered with the RBA. The registration of a business under the RBA does not endow the business with a separate legal personality that companies have. The RBA is principally concerned with ensuring that a business is registered when transactions are being carried on, and that the persons in charge have their particulars registered to be attributed responsibility. As a registered business has no

separate legal personality apart from its owner or partners, it does not cease to exist when the business registration expires. The registered business associates do not need leave of court to enforce a business contract in their own name, in the same way that the counterparty to such a business contract may also freely sue them. Thus, s. 8(1) of the RBA does not deprive the plaintiff of *locus standi* since Simfoni Humaira Resources was validly registered at all material times, and Hasnor Afifah Mohd Noor was at all material times its registered sole proprietor. Accordingly, the first defendant's preliminary objection on the first plaintiff's *locus standi* was dismissed. (paras 17-22)

(2) It was alleged that the second plaintiff did not exist when the matters in dispute transpired, but none of the factual allegations were deposed under oath in the first defendant's affidavits. Accordingly, this court took no notice of all submissions from the bar made by the first defendant and dismissed the preliminary objection raised in relation thereto. As for the first defendant's time bar argument, it was rejected for the simple reason that the pleaded cause of action was a breach of contract with specific relief, namely the refund of the deposit. It was not an action for recovery of any penalty or forfeiture under any written law. As the defendants failed to return the funds according to the stakeholders' agreement, the action was filed within the six-year limitation period under s. 6(1)(a) of the Limitation Act 1953. (paras 26 & 27)

(3) The deponent of the first defendant's affidavits, Khamil Ismail, had been adjudicated a bankrupt. According to s. 198(1) of the Companies Act 2016, Khamil was thus not qualified to hold office as a director of a company or whether directly or indirectly be concerned with or take part in the management of a company. A bankrupt has no capacity to affirm an affidavit on behalf of the company and his averments pertaining to the company was inadmissible and could not be relied upon. Thus, the prohibition in s. 198(1) would include Khamil's actions in instructing solicitors and affirming affidavits in the capacity of a director on behalf of the first defendant. Enclosure 56 may therefore be dismissed *in limine* in the absence of any affidavit to be read in support of it. (paras 31 & 32)

(4) The first defendant had waived any agreement to arbitrate the disputes in this originating summons because it had taken steps in the court proceedings before making the application in encl. 56, *inter alia*, (i) attending and participating in numerous case managements and hearings; (ii) consenting to the plaintiffs' two prior applications to amend the originating summons and approving draft orders; (iii) requesting an extension of time to file the first defendant's affidavit to oppose the originating summons; and (iv) filing encl. 56 with a prayer for security for the costs of the originating summons. The above actions

were all undertaken without any qualification or reservation of rights. Any one of the identified steps taken before and with the filing of encl. 56 would be tantamount to the first defendant's unequivocal submission to jurisdiction and intention to proceed in the High Court. There was no basis for the first defendant to apply to stay these proceedings or to seek any interim relief under s. 11 of the Arbitration Act 2005. Accordingly, all the prayers in encl. 56 that were premised on the commencement of a contemplated arbitration necessarily failed. (paras 39-41)

(5) The application for security for costs against the plaintiffs was dismissed because (i) there was a long and unexplained delay in the filing of the application in encl. 56; (ii) costs were recoverable from the second plaintiff as a foreign party, even if the process may be inconvenient; (iii) there was no separate cause of action against the second plaintiff and there was recourse against the first plaintiff for costs; (iv) the first plaintiff was a Malaysian citizen with an address here and no evidence was produced to demonstrate that she was impecunious or otherwise unable to pay costs; (v) there was no indication that either the plaintiff had conducted the litigation in a way that suggested an attempt to evade costs and (vi) the plaintiffs have a well-founded case for recovery of the deposit based on the evidence adduced. (para 53)

Case(s) referred to:

Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd [2024] 4 CLJ 243 CA ***(refd)***

Arci Enterprise v. Selinsing Mining Sdn Bhd & Ors [2007] 1 CLJ 12 CA ***(refd)***

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Stamford College (Malacca) Sdn Bhd [2024] CLJU 1598 CA ***(refd)***

Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal [2023] 1 CLJ 20; [2022] 1 LNS 2600 CA ***(refd)***

HT Maltec Consultants v. Malaysian Resources Corporation Berhad & Ors [2015] CLJU 68; [2015] 1 LNS 68 HC ***(refd)***

IFCI Ltd v. Archipelago Insurance Ltd [2022] 2 CLJ 535 CA ***(refd)***

JSB v. ACSB [2024] 1 CLJ 382 CA ***(refd)***

Leasing Corporation Sdn Bhd v. Indah Lestari Sdn Bhd [2007] 6 CLJ 548 CA ***(refd)***

Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Ltd [1993] HKCU 163 ***(refd)***

Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd & Other Appeals [2023] CLJU 1078; [2023] 1 LNS 1078 CA ***(refd)***

Mun Seng Fook v. AIG Malaysia Insurance Bhd [2018] 8 CLJ 394 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Nigel Peter Albon v. Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075 ***(refd)***

OSK Construction Sdn Bhd v. Anuraadhaa Jeyasingam [2022] CLJU 3011; [2022] 1 LNS 3011 HC ***(refd)***

Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 6, 10, 11(1)(a), (e), 18
Companies Act 2016, s. 198(1)
Limitation Act 1953, s. 6(1)(a), (4)
Registration of Businesses Act 1956, s. 8(1)
Rules of Court 2012, O. 23 r. 1

For the plaintiff - Frida Krishnan & Ng Chia How, The Chambers Of Frida
For the 1st defendant - Bestian Ng; M/s M Raman & Assocs
For the 2nd & 3rd defendants - Wong Yun Loong; M/s Isa Aziz Ibrahim
For the 4th, 5th, 6th & 7th defendants - Tan Ying Xuan; M/s Azim, Tunku Farik & Wong

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 56)

Elaine Yap Chin Gaik JC:

Introduction

[1] In this originating summons, the plaintiffs seek a declaration that a sale and purchase agreement dated 15 September 2020 ("SPA") has been mutually terminated after the first defendant failed to deliver the goods purchased and consequently, the sum RM1,194,000 held under a stakeholders' agreement dated 21 September 2020 ("stakeholders' agreement") should be refunded.

[2] More than a year after the initiation of the suit, the first defendant through its solicitors, Messrs M Raman & Associates, filed encl. 56 on 31 March 2024 for various relief. The prayers sought can be summarised as follows:

(i) plaintiffs to furnish security for costs in the sum of RM150,000 each to the first defendant's solicitors as stakeholders (under s. 11(1)(e) of the Arbitration Act 2005 and O. 23 of the Rules of Court 2012)

(ii) plaintiffs be compelled to commence arbitration proceeding within six months from an order (to stay proceedings under s. 10 of the Arbitration Act 2005), and failing that, or if the proceedings result in the first defendant's favour, costs here and in the arbitration be assessed and recovered from the security for costs; and

(iii) The sum of RM1,194,000 held by Messrs Fahmi Zafri Ashraf & Co ("F & Co") be at *status quo* pursuant to s. 11(1)(a) of the Arbitration Act 2005).

[3] I dismissed encl. 56 on 8 November 2024 with costs of RM10,000, and these are my reasons.

Background Facts

[4] Simfoni Humaira Resources (as buyer) and the first defendant (as seller) entered into the SPA for the sale and purchase of disposable nitrile gloves. The total contract value was RM7,164,000. A deposit of RM1,194,000 ("deposit") was paid to the account of FZA & Co as the seller's solicitors.

[5] FZA & Co, Simfoni Humaira Resources and the first defendant then entered into the stakeholders' agreement under which FZA & Co undertook to hold the deposit as a neutral stakeholder. The monies were deposited into the client account of the firm.

[6] Issues arose with the delivery of the goods purchased under the SPA. Based on a series of email exchanges in March/April 2021 between one Ronnie Lim, Sales & Marketing Malaysia of the first defendant, Abdillah of the first plaintiff and Sylwia Kostecka for the second plaintiff, the plaintiffs say the SPA was mutually terminated.

Preliminary Objections

[7] The first defendant raised various 'preliminary objections' in written submissions filed by counsel on 28 October 2024 in support of encl. 56 found in encl. 99 ("D1's written submissions"). The 'preliminary objections' were as follows:

(i) based on s. 8 of the Registration of Business Act 1956 ("RBA"), the first plaintiff has no *locus standi* to enforce a contract under an invalid business registration without leave of court;

(ii) according to Polish company registration documents found by the first defendant, the second plaintiff was registered on 1 September 2022 and did not exist when the matters in dispute transpired between 15 September 2020 and 17 May 2021;

(iii) the content of the plaintiffs' affidavits is hearsay and inadmissible and/or scandalous and constitutes contempt in the face of the court by reference to various factual assertions made in paras. 14 and 15 of D1's written submissions; and

(iv) the action is time-barred.

The First Plaintiff's Locus Standi

[8] The first defendant contended that the expiry of the registration of Simfoni Humaira Resources under the RBA on 28 October 2022 before this suit was filed, rendered the first plaintiff incompetent to enforce the SPA and/or the stakeholders' agreement without leave of court.

[9] This court was of the view that the matter of the first plaintiff's *locus standi* is a substantive matter that ought not to have been addressed as a preliminary objection. It was not specifically put in issue in the affidavits filed. Since the issue was ventilated in written submissions and may be an issue taken up on appeal, I will address it here.

[10] The unchallenged averment by the first plaintiff is that Hasnor Afifah binti Mohd Noor was at all material times the sole proprietor of Simfoni Humairah Resources when the SPA and the stakeholders' agreement were entered into and when the facts setting up the pleaded cause of action arose in 2021.

[11] The first defendant relied on the case of *Arci Enterprise v. Selinsing Mining Sdn Bhd & Ors* [2007] 1 CLJ 12 ("*Arci Enterprise*") for its objection. There, an originating summons was taken out in the name of the business, Arci Enterprise. The registration of the original Arci Enterprise had expired after the filing, and the partners registered a new Arci Enterprise which registration was later terminated by the Registrar.

[12] The originating summons in *Arci Enterprise* was struck out on grounds that the plaintiff firm lacked standing to carry on the action due to the revocation of its business registration following the bankruptcy of one of its partners. The Court of Appeal held as follows in that case:

> [14] It is therefore clear that non-registration or invalid registration or default in registration does not make a contract entered into by a partner void *ab initio*. However no suit may be brought by a partner to enforce such a contract unless he has first obtained relief from the High Court in accordance with the proviso to s. 8(1). **But in the present case it is not a partner who is suing in the name of the plaintiff firm. It is the firm itself**. Accordingly, on the present facts, the revocation of the firm's registration deprived the plaintiff standing to continue with the action against the defendants.
>
> (emphasis added)

[13] The Court of Appeal in *Arci Enterprise* was referring to s. 8(1) of the RBA which provides that:

> So long as the prescribed particulars in respect of any person who is or who claims to be an associate of any business **are not recorded in the register**, no right of any such person under or arising out of any contract made or entered into by or on behalf of such person in relation to such business shall be enforceable by suit or other legal proceeding either in the name of such business or in his individual name or otherwise ...
>
> (emphasis added)

[14] The facts of the case in *Arci Enterprise* is not on all fours with the present case. The specific question to be answered in this case is whether the owner or a partner of a registered business may sue to enforce a contract properly made in relation to the business, and do so in her individual name without leave of court, after the business registration has expired.

[15] The High Court in *OSK Construction Sdn Bhd v. Anuraadhaa Jeyasingam* [2022] CLJU 3011; [2022] 1 LNS 3011; [2022] MLJU 3310 ("*OSK Construction*") considered the same question raised here. The defendant also argued that the plaintiff had no legal capacity or *locus standi* to sue because at the time of filing the civil suit her registration of business had expired.

[16] The High Court in *OSK Construction* distinguished *Arci Enterprise* and held that the defendant's submission was devoid of merit. Dissecting s. 8(1) of the RBA, the court held that there is nothing there that deprives a sole proprietor or partners of a partnership to sue on a contract if the registration of business had expired:

> [27] ... all section 8(1) of the RBA does is to impose a disability on a person who claims to be an "associate of a business", whose name or particulars are not recorded in the register of businesses, from enforcing any contract by way of legal proceedings either in his name or in the name of the business that such person claims to have been made in relation to such business.

[17] Likewise, this court takes the view that s. 8(1) of the RBA deals with the right of a person who is or claims to be the owner or partner of a business, to enforce its contracts, if the particulars of such person are not registered under the RBA or if the business itself is not registered with the RBA. It does not apply to the situation in this case.

[18] Further, it was clearly explained in *HT Maltec Consultants v. Malaysian Resources Corporation Bhd & Ors* [2015] CLJU 68; [2015] 1 LNS 68 that the registration of a business under the RBA does not endow the business with a separate legal personality that companies have. The RBA is principally concerned with ensuring that a business is registered when transactions are being carried on, and that the persons in charge have their particulars registered to be attributed responsibility.

[19] As a registered business has no separate legal personality apart from its owner or partners (defined in the RBA as the business associates), it does not cease to exist when the business registration expires. The registered business associates do not need leave of court to enforce a business contract in their own name, in the same way that the counterparty to such a business contract may also freely sue them.

[20] Thus, s. 8(1) of the RBA does not deprive the plaintiff of *locus standi* since Simfoni Humaira Resources was validly registered at all material times, and Hasnor Afifah binti Mohd Noorwas at all material times its registered sole proprietor. She has always been the person competent to sue or be sued in relation to business undertaken by Simfoni Humaira Resources.

[21] In this case, the plaintiff had initially sued only in the name of Simfoni Humairah Resources. This may have presented a problem based on *Arci Enterpise*. On 11 April 2023, however, any problem was resolved when the plaintiff obtained leave of court to amend the originating summons to reflect that the first plaintiff was suing through Hasnor Afifah binti Mohd Noor as the sole proprietor of Simfoni Humaira Resources.

[22] Accordingly, the first defendant's preliminary objection on the first plaintiff's *locus standi* was dismissed.

The Factual Allegations

[23] In respect of the various other allegations advanced in submissions by the first defendant as "preliminary objections," they were also very much substantive disputes of fact. For example, it was alleged that the second plaintiff did not exist when the matters in dispute transpired, that the domain sh-resources.com used in emails exhibited in the plaintiffs' affidavits was never registered, and that a Maybank Account No. 569954062294 referred to by the first plaintiff also did not exist.

[24] After perusing the first defendant's affidavits, this court agreed with the plaintiffs that none of the factual allegations made in the table at paras. 14 and 15 of D1's written submissions and repeated elsewhere, were deposed under oath in the first defendant's affidavits. As cautioned by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609:

> It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act, as the learned Judicial Commissioner did in this case is to ignore the very basic tenets of the law of evidence that is applied by our Courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay.

[25] Accordingly, this court took no notice of all submissions from the bar made by the counsel for the first defendant in D1's written submissions and dismissed the "preliminary objections" raised by the first defendant in relation thereto.

The Statutory Time Bar

[26] Finally, the first defendant submitted that by this action, the plaintiffs are seeking to recover a "penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law" which according to s. 6(4) of the Limitation Act 1953, has a statutory time limit of one-year from the date on which the cause of action accrued.

[27] The time bar argument was rejected for the simple reason that the pleaded cause of action is breach of contract with specific relief, namely the refund of the deposit. It is not an action for recovery of any penalty or forfeiture under any written law. As the defendants failed to return the funds according to the stakeholders' agreement in 2021, the action was filed well within the six-year limitation period under s. 6(1)(a) of the Limitation Act 1953.

Khamil Ismail's Bankruptcy

[28] The plaintiffs also raised a preliminary objection, namely that the deponent of the first defendant's affidavits, Khamil bin Ismail, had been adjudicated a bankrupt on 1 June 2018. According to s. 198(1) of the Companies Act 2016, Khamil bin Ismail was thus not qualified to hold office as a director of a company or whether directly or indirectly be concerned with or take part in the management of a company.

[29] Relying on *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606; [1991] 1 MLJ 111 and *Leasing Corporation Sdn Bhd v. Indah Lestari Sdn Bhd* [2007] 6 CLJ 548; [2007] 7 MLJ 506 ("*Leasing Corporation*"), the plaintiffs submitted that the affidavits purportedly affirmed by Khamil bin Ismail on behalf of the first defendant are unreliable and must be disregarded because of his lack of capacity.

[30] The challenge to the first defendant to produce Khamil bin Ismail's authority to affirm the affidavits in support of encl. 56 was made in affidavits filed on behalf of the plaintiffs but it was not addressed by the first defendant. Specifically, there is no evidence of any permission by the official receiver for Khamil bin Ismail to function as a director of the first defendant.

[31] According to the Court of Appeal in *Leasing Corporation*, a bankrupt has no capacity to affirm an affidavit on behalf of the company and that his averments pertaining to the company are inadmissible and cannot be relied upon. The Court of Appeal held that the affidavits affirmed by the plaintiff in the High Court were invalid and should have been disregarded at the hearing in the High Court.

[32] Taking the cue from *Leasing Corporation*, I agree that the prohibition in s. 198(1) of the Companies Act 2016 would include Khamil bin Ismail's actions in instructing solicitors and affirming affidavits in the capacity of a director on behalf of the first defendant. Enclosure 56 may therefore be dismissed *in limine* in the absence of any affidavit to be read in support of it.

[33] Nevertheless, I considered encl. 56 on its merits and also had no difficulty dismissing the application for the reasons which follow below.

Analysis And Findings

[34] I have summarised the prayers sought in encl. 56 at para. [2] above, inserting in square brackets what this court assumed was intended. Construing the application generously, it appeared that the first defendant was invoking:

(i) section 10 of the Arbitration Act 2005 for a stay of this originating summons pending referral of the dispute thereunder to arbitration;

(ii) sections 11(1)(e) and (a) of the Arbitration Act 2005 for interim relief in aid of the contemplated arbitration, namely security for costs and the preservation of the deposit with FZA & Co; and

(iii) Order 23 of the Rules of Court 2012 for security for the costs of this originating summons.

[35] As noted, the first defendant sought a global sum of RM300,000 as security for costs, or RM150,000 from each of the plaintiffs. There is no breakdown of this estimate of costs.

Stay Pending Arbitration

[36] Section 10 of the Arbitration Act 2005 requires this court to stay the proceedings before it if the parties have agreed to arbitration to resolve their disputes unless the first defendant has taken other steps in the proceedings or that on the evidence before it, the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[37] The first defendant relied on the existence of an arbitration agreement in the SPA which reads as follows ('arbitration clause'):

> 12. Arbitration:
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> Any disputes arising from this contract shall be settled by negotiations between both parties. In case the disagreement, the case under dispute shall be submitted to the Arbitration Institute of the Arbitration Court of Malaysia. The decision made by the Arbitration Commission shall be accepted as final and binding upon both parties. The arbitration tees shall be borne by the losing party unless otherwise awarded.

and contended that all the conditions are present for a stay of these proceedings under s. 10 of the Arbitration Act 2005.

[38] The Federal Court in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213; [2002] 2 MLJ 625 considered what constitutes steps in the proceedings that disqualify a litigant from thereafter moving the court to stay proceedings under the repealed s. 6 of the Arbitration Act 1952. It remains good law that (a) the entry of appearance is not a step, (b) the service of pleadings is a step, and:

> (c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an equivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

[39] In this case, the short answer to the first defendant's prayer for stay is that the first defendant had waived any agreement to arbitrate the disputes in this originating summons because it had taken steps in the court proceedings before making the application in encl. 56. The identifiable steps taken by the first defendant in these proceedings are not really disputable as they are a matter of record:

(i) attending and participating in numerous case managements and hearings since March 2023;

(ii) consenting to the plaintiffs' two prior applications to amend the originating summons and approving draft orders;

(iii) requesting an extension of time to file the first defendant's affidavit to oppose the originating summons; and

(iv) filing encl. 56 with a prayer for security for the costs of the originating summons.

The above actions were all undertaken without any qualification or reservation of rights. Any one of the identified steps taken before and with the filing of encl. 56 would be tantamount to the first defendant's unequivocal submission to jurisdiction and intention to proceed in the High Court (see *Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 4 CLJ 243; *IFCI Ltd v. Archipelago Insurance Ltd* [2022] 2 CLJ 535; *Mun Seng Fook v. AIG Malaysia Insurance Bhd* [2018] 8 CLJ 394; [2019] 7 MLJ 59; *JSB v. ACSB* [2024] 1 CLJ 382).

[40] This court has noted that even the steps taken after encl. 56 signalled ambivalence, at best. After the filing of encl. 56, the first defendant proceeded to file a substantive affidavit to oppose the originating summons in encl. 60, and another application in encl. 67 to seek the removal of the second to seventh defendants from the proceedings.

[41] Having thus submitted to the jurisdiction of the court for the determination of the matters in question in the originating summons, there was no basis for the first defendant to apply to stay these proceedings or to seek any interim relief under s. 11 of the Arbitration Act 2005. Accordingly, all of the prayers in encl. 56 that are premised on the commencement of a contemplated arbitration necessarily failed.

[42] The plaintiffs have advanced other grounds why an application to stay these proceedings under s. 10 of the Arbitration Act 2005 should be rejected. As a matter of interest, I address the argument that the arbitration clause is inoperative or incapable of being performed since it names what is a non-existent arbitration body in that clause (arbitration institute of the Arbitration Court of Malaysia).

[43] On this point, the first defendant contended simply that the validity of the arbitration clause should be decided by an arbitral tribunal, adverting to s. 18 of the Arbitration Act 2005 and case law for the proposition that this court should take a hands-off approach as soon as a hint of an arbitration agreement is present.

[44] In the context of arguably pathological arbitration clauses, the proper approach that the courts should take was recently explained by the Court of Appeal in *Asia Pacific Higher Learning Sdn Bhd v. Stamford College (Malacca) Sdn Bhd* [2024] CLJU 1598; [2024] MLJU 1712 ("*Asia Pacific Higher Learning*").

[45] Briefly summarised, *Asia Pacific Higher Learning* held that s. 18 of the Arbitration Act 2005 does not preclude the court itself from determining a challenge to the jurisdiction of the arbitral tribunal and different approaches should be taken depending on the nature of the objection and the available evidence. The Court of Appeal observed:

> [15] Briefly, the Appellant contended that there is an arbitration clause in the Agreement and that the Appellant has met the requisite conditions in the stay for reference to arbitration application under s. 10 of the Act. Furthermore, the Appellant primarily contended that the prima facie approach instead of the full merits approach ought to be adopted when considering whether the court action should be stayed when it is contended that the arbitration is allegedly null and void, inoperative or incapable of being performed following the cases of this court in *Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd and Another Appeal* [2022] 6 MLJ 786 (CA) ...
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> [16] The Respondent counter-contended that the full merits approach should be and rightly adopted by the learned Judicial Commissioner following the case of this Court in *Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd* [2023] 4 MLJ 551 (CA). Having adopted this approach, the learned Judicial Commissioner examined into the effectiveness of the arbitration clause and is correct in dismissing the Application.

[46] As observed, the full merits approach referred to in *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd & Other Appeals* [2023] CLJU 1078; [2023] 1 LNS 1078; [2023] 4 MLJ 551 is itself a multi-faceted approach, following the guidelines adopted by Lightman J in *Nigel Peter Albon v. Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075:

> These guidelines are to the effect that on an application for a stay such as the present where the conclusion of the arbitration agreement is in issue, there are four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay; (2) to give directions for the trial by the court of the issue; (3) to stay the proceedings on the basis that the arbitrator will decide the issue; and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay.

[47] After analysing the decisions in *Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal* [2023] 1 CLJ 20; [2022] 1 LNS 2600; [2022] 6 MLJ 786 and *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd & Other Appeals* [2023] CLJU 1078; [2023] 1 LNS 1078; [2023] 4 MLJ 551, the Court of Appeal in *Asia Pacific Higher Learning* provided the following clarification:

> [25] Foremost, we wish to clarify that the approach enunciated in *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd* (*supra*) is the just and convenient approach and not the full merits approach which has been coined by the High Court therein (see paragraph [90] of *Lysaght Corrugated Pipe Sdn Bhd & Anor v. Popeye Sdn Bhd & Anor* [2002] CLJU 191).
>
> [26] This just and convenient approach applies in the situation when there is plainly an arbitration agreement but the issue is whether that arbitration agreement is invalidated because it is null and void, inoperative or incapable of being performed.
>
> [27] It must be contrasted with the situation where the existence of the arbitration agreement itself is in issue and in such circumstances, the approach that should be adopted is as prescribed in *Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd and Another Appeal* (*supra*).
>
> ...
>
> [29] It is the just and convenient approach that is applicable here. Since the operativity of the arbitration clause is purely a question of law of construction of the clause itself, we find on the facts and circumstances of this case that the court of law is better place to decide it compared to an arbitrator who may not be legally qualified. This is in accordance with the 4th option of the guidelines recommended in the *Peter Albon* case (see paragraph [21] above at paragraph [18] of *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd* (*supra*)).

[48] This court can likewise determine whether the arbitration clause is inoperative or incapable of being performed due to its reference to a non-existent arbitration body. If the issue was relevant, I would have been inclined to follow the reasoning of the Hong Kong Supreme Court in *Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Ltd* [1993] HKCU 163 which concerned an application for stay based on the following arbitration clause:

> ... Any dispute or difference arising out of or relating to this contract, or the breach thereof which cannot be settled amicably without under delay by the interested parties shall be arbitrated in the 3RD Country, under the rule of the 3RD Country and in accordance with the rules of procedure of the International Commercial Arbitration Association. The award shall be final and binding upon both parties.

[49] Kaplan J held:

> It is also common ground between the parties that the International Commercial Arbitration Association referred to in the arbitration clause is a non-existent organisation. No useful purpose can be served by speculating as to what was actually intended by the use of these words ...
>
> Having considered all of Mr. Whitehead's arguments, I cannot see how it can be said that the arbitration clause is "inoperative or incapable of being performed". True, it is, that there will be no arbitration under the rules of the International Commercial Arbitration Association, but there will be an arbitration under the law of the place of arbitration chosen by the plaintiffs and they have a very wide choice indeed. The parties have made their intention arbitration perfectly plain in this case ...
>
> I believe that the correct approach in this case is to satisfy myself that the parties have clearly expressed the intention to arbitrate any dispute which may arise under this contract. I am so satisfied. I am also satisfied that they have chosen the law of the place of arbitration to govern the arbitration even though that place has not yet been chosen by the plaintiffs. As to the reference to the non-existent arbitration institution and rules, I believe that the correct approach is simply to ignore it. I can give no effect to it and I reject all reference to it so as to be able to give effect to the clear intention of the parties.

[50] As it relates to the first defendant's contention about whether the arbitration clause in the SPA is applicable at all, the competing contention by the plaintiffs is that this originating summons is anchored on the stakeholders agreement, there being no dispute on what caused the mutual termination of the SPA and the consequences thereof. As I have held that the first defendant had taken steps in the proceedings and submitted to the jurisdiction of the court, the issue had become moot.

[51] I therefore refrained from considering in detail at this stage, the substantive questions that form the subject matter of the originating summons now before me, whether they be related to the SPA or the stakeholders' agreement.

Security For Costs

[52] In applying for security for costs, the first defendant had in its written submissions, relied entirely on O. 23 r. 1 of the Rules of Court 2012 as its premise. The jurisprudence on this topic is well-settled and there is no need to cite any authority. This court has a discretion, having regard to all the circumstances of the case, to order security for costs if it thinks just to do.

[53] In this case, the application for security for costs against both plaintiffs was dismissed considering the following circumstances:

(i) there was a long and unexplained delay in the filing of the application in encl. 56;

(ii) costs are recoverable from the second plaintiff as a foreign party, even if the process may be inconvenient;

(iii) in any case, there is no separate cause of action against the second plaintiff and there is recourse against the first plaintiff for costs;

(iv) the first plaintiff is a Malaysian citizen with an address here and no evidence was produced to demonstrate that she is impecunious or otherwise unable to pay costs;

(v) there is no indication that either plaintiff had conducted the litigation in a way that suggested an attempt to evade costs; and

(vi) the plaintiffs have a well-founded case for recovery of the deposit based on the evidence adduced.

[54] I should conclude by highlighting that the RM300,000 sought as security for costs is wholly disproportionate to any costs recoverable in an originating summons. The first defendant did not attempt to justify this amount, or state what portion of such amount relates to the originating summons.

Conclusion

[55] For the reasons set out above, the prayers in encl. 56 for a stay of these proceedings pending arbitration are dismissed. Consequently, all prayers in encl. 56 for interim relief in aid or arbitration, premised on the commencement of the contemplated arbitration proceedings are also dismissed.

[56] Insofar as the prayers in encl. 56 relate to security for the costs of defending against the originating summons, they are also dismissed.